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Nos. 14-556, 14-562, 14-571 & 14-574

In the

Supreme Court of the United States

JAMES OBERGEFELL AND BRITTANI HENRY ET AL.,
Petitioners,

V.

RICHARD HODGES, DIRECTOR, OHIO DEPARTMENT OF HEALTH, ET AL.,
Respondents.

[Additional Case Captions Listed On Inside Front Cover]

On Writs Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

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BRIEF OF *AMICI CURIAE* PROFESSORS LAURENCE H. TRIBE AND MICHAEL C. DORF IN SUPPORT OF PETITIONERS

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MARCH 6, 2015

VALERIA TANCO, ET AL.,

Petitioners,

v.

WILLIAM EDWARD "BILL" HASLAM, GOV. OF TENNESSEE, ET AL.,

Respondents.

APRIL DEBOER, ET AL.,

Petitioners,

v.

RICHARD SNYDER, GOV. OF MICHIGAN, ET AL.,

Respondents.

GREGORY BOURKE, ET AL. & TIMOTHY LOVE, ET AL.,

Petitioners,

v.

STEVE BESHEAR, GOV. OF KENTUCKY ET AL.,

Respondents.

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INTEREST OF *AMICI CURIAE*[1]

Amici curiae are Laurence H. Tribe, the Carl M. Loeb University Professor and Professor of Constitutional Law at Harvard Law School, and Michael C. Dorf, the Robert S. Stevens Professor of Law at Cornell University Law School. In addition to their numerous respective other scholarly works on same-sex marriage and constitutional law more generally, twenty-five years ago Professors Tribe and Dorf wrote an article[2] and a book[3] addressing an issue that is implicit in the Court's first certiorari question but that may be given insufficient attention by the parties: At what level of generality should the fundamental right to marry be formulated? This brief considers that question in the event that this Court wishes to rest its judgment on principles of due process instead of, in addition to, or as this brief urges, as intertwined with, principles of equal protection.

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[1] Pursuant to SUP. CT. R. 37.3(a), amici certify that Respondents have given blanket consent to the filing of amicus briefs in support of either party, and Petitioners have consented to the filing of this brief in correspondence on file with the Clerk. Pursuant to SUP. CT. R. 37.6, amici certify that no counsel for any party authored this brief in whole or in part, no party or party's counsel made a monetary contribution to fund its preparation or submission, and no person other than amici or their counsel made such a monetary contribution.

[2] Laurence H. Tribe & Michael C. Dorf, *Levels of Generality in the Definition of Rights*, 57 U. Chi. L. Rev. 1057 (1990).

[3] Laurence H. Tribe & Michael C. Dorf, *On Reading the Constitution* (1991).

SUMMARY OF ARGUMENT

This brief addresses whether state bans on same-sex marriage violate the Due Process Clause of the Fourteenth Amendment. It concludes that such bans are unconstitutional because they violate the fundamental right to marriage recognized in *Loving v. Virginia*, 388 U.S. 1 (1967), and other cases.

In *Loving*, this Court invalidated Virginia's ban on interracial marriage on the ground that the challenged law discriminated on the basis of race in violation of equal protection *and* on the alternative ground that its denial of the "fundamental freedom" to marry was "unsupportable." 388 U.S. at 12. This Court's subsequent decisions in *Zablocki v. Redhail*, 434 U.S. 374 (1978), and *Turner v. Safley*, 482 U.S. 78 (1987), confirmed that marriage is a fundamental right. The Court's opinions carefully scrutinized the justifications for the marriage restrictions at issue in those cases and held that neither failure to make child support payments nor imprisonment provided sufficient grounds to infringe that fundamental right. State bans on same-sex marriage are likewise unconstitutional infringements on the fundamental right to marry recognized in those three cases. Under *Lawrence v. Texas*, 539 U.S. 558 (2003), and *United States v. Windsor*, 133 S. Ct. 2675 (2013), it is clear that demeaning views of same-sex relationships cannot provide a valid basis for restricting the fundamental right to marry.

Some defenders of state same-sex marriage bans contend that this Court changed its analysis of fundamental rights in *Washington v. Glucksberg*, 521 U.S. 702 (1997), and mandated a very narrow

delineation of the fundamental right claimed to be at issue in any given case. But in *Glucksberg*, which declined to categorically invalidate state laws prohibiting assisted suicide, the Court found no fundamental right to commit suicide comparable to the right to marry, and then went on to find no reason to permit persons to assist others in committing suicide. There is simply no merit to the claim that *Glucksberg* profoundly altered this Court's approach to identifying fundamental rights, and the argument advanced by Judge Niemeyer in dissent in *Bostic v. Schaefer*, 760 F.3d 352, 386 (4th Cir. 2014), is therefore wrong.

Judge Niemeyer's argument that fundamental rights must be defined very narrowly may be understood as an attempt to revive an approach suggested by Justice Scalia in footnote 6 in *Michael H. v. Gerald D.*, 491 U.S. 110, 127 n.6 (1989). That footnote was joined by only one other Justice and the approach suggested there was again explicitly rejected by the Court in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 847-48 (1992).

And rightly so. Footnote 6 in *Michael H* argued that any other approach to analyzing historical traditions was arbitrary. 491 U.S. at 127 n.6. But the narrowest-level approach is no more principled, and thus it makes a false claim to value-neutrality.

Although no method of constitutional construction is purely value-neutral, Justice Harlan's pathbreaking dissent in *Poe v. Ullman*, 367 U.S. 497, 539-55 (1961), points the way to a moderately constrained methodology which looks, *inter alia*, to

other parts of the Constitution itself—especially the Bill of Rights—for guideposts.

This Court's precedents have identified another textual source to guide fundamental rights analysis: the Equal Protection Clause. In *Lawrence*, the Court built on Justice Harlan's approach in holding that adults "engaged in sexual practices common to the homosexual lifestyle ... are entitled to respect for their private lives" and that state sodomy laws therefore violated the liberty protected by the Due Process Clause. 539 U.S. at 578.[4] And in *Windsor* the Court struck down Section 2 of the Defense of Marriage Act because its purpose and effect were "to demean those persons who are in a lawful same-sex marriage." 133 S. Ct. at 2695. Those holdings together make clear the linkage between constitutional equality and constitutional liberty. Applied in the current setting, they show why the challenged laws violate both the Equal Protection and Due Process Clauses.

This Court need not fear that failure to restrict the previously recognized right to marry would entail a right to incestuous, polygamous, or child marriage. Laws forbidding or denying recognition to these practices can be defended based on their protection of the rights and interests of persons other than fully consenting adults.

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[4] The "focus on the right to dignity and equal respect for people involved in intimate relationships" in the Court's opinion in *Lawrence* was its "most distinctive facet." Laurence H. Tribe, Lawrence v. Texas: *The Fundamental Right that Dare not Speak its Name*, 117 Harv. L. Rev. 1893, 1945 (2004).

ARGUMENT

Petitioners correctly argue that state laws prohibiting same-sex marriage violate both the equal protection and due process guarantees of the Fourteenth Amendment. The Court should hold such bans unconstitutional on both grounds, as it held with respect to Virginia's ban on interracial marriage in *Loving v. Virginia*.[5] However, this brief focuses chiefly on the due process issue, and specifically on how a fundamental right protected by the Due Process Clause should be identified. As explained below, the liberty protected by the Due Process Clause should be read to encompass the right of persons of the same sex to marry. That liberty is not only an analytically distinct basis for ruling for petitioners. Because constitutional liberty and equality are mutually reinforcing, the due process argument strengthens the conclusion that the Equal Protection Clause also prohibits bans on same-sex marriage. *See Lawrence*, 539 U.S. at 575 ("Equality of treatment and the due process right to demand respect for conduct protected by the substantive guarantee of liberty are linked in important respects, and a decision on the latter point advances both interests.").

1. The level of generality at which fundamental rights are identified is of critical importance but, under this Court's cases, it is not at all difficult to

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[5] Indeed, because *amici* believe that the fundamental rights analysis complements the equal protection analysis, they have also joined a brief in the instant cases arguing that same-sex marriage bans should be invalidated pursuant to heightened scrutiny under the Equal Protection Clause. *See* Brief of Constitutional Law Scholars Ashutosh Bhagwat *et al.*

determine when it comes to marriage. Here, if the fundamental right at issue is described as the "right to marry" rather than a more specific "right to same-sex marriage," it is clear that the right is fundamental. And this Court's precedents already make abundantly clear that the broader formulation applies.

In *Loving*, the Court explained that "[t]he freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men." 388 U.S. at 12. The Court reiterated that holding in striking down a Wisconsin statute requiring child-support payments to be paid in order to obtain a marriage license in *Zablocki*, 434 U.S. at 388, and a Missouri regulation generally prohibiting prisoners from marrying in *Turner*, 482 U.S. at 99.

It practically goes without saying that the laws challenged here cannot survive strict scrutiny. Indeed, the arguments advanced to justify them even under rational basis scrutiny—such as that banning same-sex marriage somehow advances a State's interest in addressing the consequences of accidental procreation by heterosexuals—are at best non sequiturs. *See Baskin v. Bogan*, 766 F.3d 648, 662 (7th Cir. 2014) ("Heterosexuals get drunk and pregnant, producing unwanted children; their reward is to be allowed to marry. Homosexual couples do not produce unwanted children; their reward is to be denied the right to marry. Go figure.").

Such claims certainly do not survive strict scrutiny, which perhaps explains why the Respondents and their allies would prefer that the

Petitioners be characterized as seeking a right to *same-sex* marriage rather than marriage *simpliciter*. For it is concededly difficult to claim that a right to *same-sex* marriage is "objectively, deeply rooted in this Nation's history and tradition," *Glucksberg*, 521 U.S. at 720-21 (citations omitted), as it is only relatively recently that same-sex marriage became legal anywhere in this country (or, indeed, the world). But there is no basis for such a narrowed definition of the fundamental right to marry.

There was no deeply-rooted history of interracial marriage before *Loving*. To the contrary, there was a deeply-rooted and continuing history of laws banning miscegenation. As this Court noted in its opinion, in sentencing the Lovings in 1959 the Virginia judge stated that "Almighty God created the races white, black, yellow, malay and red, and he placed them on separate continents," and added that "[t]he fact that he separated the races shows that he did not intend for the races to mix." 388 U.S. at 3. The Virginia judge's view was not a new opinion, but rather one that had been long reflected in the laws of many states. And yet, this Court had no difficulty in seeing the traditionally unprotected practice of *interracial* marriage as protected under the broader rubric of the general right to *marriage*.

In a different setting, Justice Scalia offered a wholly unpersuasive response to the argument that *Loving* fatally undercuts his preferred approach of defining rights in narrow historical terms. He stated that "adherence to tradition would [not] require [the Court] to uphold laws against interracial marriage [because a]ny tradition in [*Loving*] was

contradicted *by a text*—an Equal Protection Clause that explicitly establishes racial equality as a constitutional value." *Casey*, 505 U.S. at 980 n.1 (Scalia, J., dissenting) (emphasis in original).

Yet that claim is both wrong on its own terms and would be beside the point even if true. It is wrong because it sees a constitutional text where there is none. Neither the Equal Protection Clause nor any other part of Section 1 of the Fourteenth Amendment makes any *explicit* reference whatsoever to race.

Moreover, even if one thought that the Equal Protection Clause provided protection against racial discrimination but not against other forms of invidious discrimination, that view would not have any bearing on the Due Process Clause. Justice Scalia's characterization of *Loving* as simply a race discrimination case ignores the fact that in *Loving* eight Justices thought that the fundamental right to marry provided an alternative basis for the judgment.

This Court's subsequent marriage cases confirm that *Loving* was not simply a race-discrimination case. Neither deadbeat spouses nor prisoners are defined by any suspect classification; yet this Court saw no obstacle to relying on *Loving*'s recognition of a fundamental right to marry in *Zablocki* and *Turner*.

More to the present point, there was no deeply-rooted right to marriage *by deadbeat spouses* before *Zablocki* or to marriage *by prisoners* before *Turner*. But the Court reaffirmed that there was a fundamental right to marriage and held that it could not be impaired on account of failure to pay child support or imprisonment.

Accordingly, this Court's precedents leave no room for the argument that the right claimed by Petitioners should be rejected simply because there is no longstanding tradition protecting *same-sex* marriage. There is undoubtedly a longstanding tradition protecting marriage, and under this Court's cases, that suffices.

2. Case law outside the marriage context provides no basis for characterizing the right claimed by Petitioners in narrow terms.

Dissenting from the Fourth Circuit's invalidation of Virginia's same-sex marriage ban in *Bostic v. Schaefer*, Judge Niemeyer advanced a doctrinal ground for the tradition-bound approach. He argued "that the 'marriage' that has long been recognized by the Supreme Court as a fundamental right is distinct from the newly proposed relationship of 'same-sex marriage.'" 760 F.3d. at 386. He contended that *Glucksberg* rejected the application of strict scrutiny when a "*new* fundamental right is being recognized," and argued that challengers to the same-sex marriage ban sought to establish a "*new* fundamental right to same-sex marriage." 760 F.3d at 386, 390 (emphases in original).

But nothing in *Glucksberg* requires a different approach from that followed in *Loving*, *Zablocki*, and *Turner*. *Gluckberg*'s requirement "of carefully formulating the interest at stake in substantive-due process cases," 521 U.S. at 722, is entirely consistent with the approach followed by the courts that have invalidated state bans on same-sex marriage. While the *Glucksberg* Court defined the ultimate issue as "whether the protections of the Due Process Clause

include a right to commit suicide with another's assistance," *id.* at 724, the Court began by analyzing whether there is a long-established *right to commit suicide* generally. Writing for the Court, Chief Justice Rehnquist concluded there is not, quoting Blackstone to the effect that suicide had long been ranked "among the highest crimes" and referring to "the pretended heroism, but real cowardice, of the Stoic philosophers, who destroyed themselves to avoid those ills which they had not the fortitude to endure." *Id.* at 712 (citations omitted). In contrast, marriage has not, of course, ever been ranked "among the highest crimes" or considered a sign of "real cowardice."

In short, the result in *Glucksberg* did not turn on whether the right at issue there was defined as the right to commit suicide or as the more specific right to commit suicide with assistance; the Court disclaimed prior recognition of a "'right to die'" at *either* level. *Id.* at 722 (quoting *Cruzan v. Director, Missouri Dept. of Health*, 497 U.S. 261, 277 (1990)).

Glucksberg did not purport to overrule the line of cases holding that the right to marry is a fundamental right protected by the Due Process Clause, restrictions on which are reviewed under the strict scrutiny standard. At most, *Glucksberg* might be read to establish a more stringent test for determining whether rights not already determined to be fundamental should be recognized as such. In any event, *Glucksberg* can and should be distinguished on the grounds that the Court found: (1) no firmly rooted right to commit suicide that is comparable to the right to marry; and (2) reasons to question whether assisted suicide should be permitted that are entirely unlike

any of the arguments against same-sex marriage. *See, e.g.*, *Glucksberg*, 521 U.S. at 730 (citing evidence that many people who request physician-assisted suicide subsequently withdraw their request if their pain and depression are adequately treated).

3. There is no good reason to set aside decades of fundamental rights jurisprudence in favor of the tradition-bound approach that Justice Scalia propounded in footnote 6 of *Michael H.*

In that footnote, Justice Scalia proposed that the appropriate level of generality for analyzing a putative fundamental right should be "the most specific level at which a relevant tradition protecting, or denying protection to the asserted right can be identified." 491 U.S. at 127 n.6. This approach was expressly rejected even by two of the Justices who joined the rest of Justice Scalia's *Michael H.* plurality opinion. *Id.* at 132 (O'Connor, J., joined by Kennedy, J., concurring in part). It was again rejected by the Court as a whole in *Casey*, 505 U.S. at 847-48. Citing footnote 6, the Court held that although it might be supposed that fundamental rights should be "defined at the most specific level ... such a view would be inconsistent with our law." *Id.* at 847.

This Court was right to reject historical tradition as the ultimate measure of an asserted right's fundamentality. Because Justices look to past practices to discern historical traditions, it might be thought that the process is value-neutral, merely descriptive rather than prescriptive. But the past, like the present, is messy. Consider an example involving a specific provision of the Bill of Rights. In determining the fundamental meaning of the

Establishment Clause, judges and Justices must choose among views ranging from Jefferson's wall between church and state to the idea that the United States was a Christian nation that no one denomination should control.[6]

Or consider a case like *Michael H.* itself, which involved, as Justice Scalia described the matter, "the rights of the natural father of a child adulterously conceived." 491 U.S. at 127 n.6. Why is *that* description the narrowest? The natural father in *Michael H.* had a longstanding, albeit adulterous and sporadic, relationship with the mother of his child. He also had fairly extensive, if sporadic, contact with that child. A more specific formulation of the issue than Justice Scalia provided would be: *what are the rights of the natural father of a child conceived in an adulterous but longstanding relationship, where the father has played a major, if sporadic, role in the child's early development?*

No tradition addresses that precise question at this precise level of specificity. Thus, we are left with the problem of specifying the *next* most specific tradition. But there is no single dimension or direction along which to measure the degree of abstraction or generality. Do we abstract away the father's relationship with his child and her mother, as Justice Scalia did? Or do we instead abstract away the fact that the relationship with the mother was an adulterous one? If the latter, then we will find ourselves consulting traditions regarding natural

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[6] *See* Tribe & Dorf, *Levels of Generality*, 57 U. Chi. L. Rev. at 1086-89.

fathers who play major roles in their children's development, and they may well receive constitutional protection. *Cf. Stanley v. Illinois*, 405 U.S. 645 (1972) (finding liberty interest for procedural due process purposes). Starting from an even *more* specific description of the case than did Justice Scalia makes it apparent that he had no value-neutral justification for abstracting away the father-child relationship rather than the adultery.

Moreover, as Professor Balkin has observed, "what is most troubling about Justice Scalia's call for respecting the most specific tradition available is that our most specific historical traditions may often be opposed to our more general commitments to liberty or equality." Jack Balkin, *Tradition, Betrayal, and the Politics of Deconstruction*, 11 Cardozo L. Rev. 1613, 1618 (1990). "The fourteenth amendment's abstract commitment to racial equality was accompanied by simultaneous acceptance of segregated public schools in the District of Columbia and acquiescence in antimiscegenation laws." *Id.* (internal citations omitted).None of this is to say that history and tradition are irrelevant. But there is a key difference between considering history and fetishizing it. As Justice Harlan put the point in his *Poe* dissent, in deciding the scope of liberty under the Due Process Clause, this Court must pay attention to "what history teaches are the traditions from which" the proper constitutional balance between liberty and social order "developed as well as the traditions from which it broke. That tradition is a living thing." 367 U.S. at 542.

4. Because the actual justifications for same-sex marriage bans fare so poorly under even the most minimal scrutiny, defenders of these laws frequently invoke a parade of horribles. Recognizing a right to same-sex marriage, they say, "will necessarily lead to the invalidation of bans on incest, polygamy, and child marriage." *Latta v. Otter*, 771 F.3d 456, 478 n.2 (9th Cir. 2014) (Reinhardt, J., concurring).[7] But as Judge Reinhardt noted, fundamental rights may be abridged by laws that "further compelling state interests, to which they are narrowly tailored," and "it is not difficult to envision that states could proffer substantially more compelling justifications for such laws than have been put forward in support of the same-sex marriage bans at issue here." *Id.*

In *Lawrence* too, this Court was faced with a parade of hypothetical laws that would supposedly succumb to the Court's recognition of constitutional protection for sexual intimacy. That list included some of the practices now invoked, as well as others, such as bestiality and obscenity. 539 U.S. at 590 (Scalia, J., dissenting). But here, as in *Lawrence*, the link between constitutional liberty and equality renders such concerns fanciful. This Court's focus in *Lawrence* on the rights of "two adults who, with full and mutual consent from each other, engaged in

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[7] Some of the comparisons between same-sex marriage and rights hypothesized by the lower courts—such as Judge Niemeyer's reference to an alleged "'right' of a father to marry his daughter," 760 F.3d at 386—reflect a view that itself demeans same-sex couples. There are sound biological and social reasons to prevent fathers from marrying their daughters that do not apply to unions between consenting adults of the same sex.

sexual practices common to the homosexual lifestyle," 539 U.S. at 578, did not require recognition for practices that either play no essential role in human relationships or cause harm to third parties. Likewise here, to recognize that lesbians and gay men may not be banished from the institution of marriage would hardly open the door to successful constitutional claims for incestuous, polygamous, and child marriages.

* * * * *

In dissent in *Lawrence*, Justice Scalia correctly identified the euphemisms protecting traditional marriage as a "kinder way of describing the State's moral disapproval of same-sex couples." 539 U.S. at 601 (Scalia, J., dissenting). Nothing in the records compiled by the various district courts and courts of appeals suggests that there is any reason other than moral disapproval to deny same-sex persons the right to marry. Accordingly, "'just as neither history nor tradition could save a law prohibiting miscegenation from constitutional attack,'" *Lawrence*, 539 U.S. at 577-78 (quoting *Bowers v. Hardwick*, 478 U.S. 186, 216 (1986) (Stevens, J., dissenting)), neither history nor tradition should save laws prohibiting same-sex marriage.

CONCLUSION

The judgment below should be reversed.

Respectfully submitted,

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